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Nos. 704 and 705

In the Supreme Court of the United States

OCTOBER TERM, 1959

T. LAMAR CAUDLE, PETITIONER

v.

UNITED STATES OF AMERICA

MATTHEW J. CONNELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
KIRBY W. PATTERSON,
Attorney,
Department of Justice, Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court of appeals, affirming the denial by the district court of petitioners' motions for a new trial, is reported at 271 F. 2d 333 (App. 92–98).[1] The opinion of the district court (App. 76–91) is not reported. The opinion of the court of appeals affirm-

[1] "App." refers to the appendix filed by the petitioners herein; "R." to the record of the proceedings in the court of appeals on this motion; "G.J. Tr." to the grand jury transcript.

ing petitioners' conviction is reported at 249 F. 2d 576, certiorari denied, 356 U.S. 921, rehearing denied, 356 U.S. 964.

JURISDICTION

The opinion of the court of appeals was rendered on November 9, 1959. Petitioners' motions for rehearing were denied on December 14, 1959 (App. 100–101). On December 29, 1959, Mr. Justice Black extended the time for filing a petition for writ of certiorari to and including February 12, 1960 (App. 101). The petitions for writs of certiorari were filed on February 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the ruling of the district court that newly discovered evidence was insufficient to warrant a new trial for petitioners should be overturned.

RULE INVOLVED

Rule 33, F.R. Crim. P., provides in pertinent part:

> The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on removal of the case. * * *

STATEMENT

1. Petitioners were convicted June 14, 1956, in the District Court for the Eastern District of Missouri on a charge of conspiracy to defraud the United States

of the proper administration of the internal revenue laws and regulations and of the proper and faithful services of petitioners. Each of them was sentenced to imprisonment for a period of two years and a fine of $2,500. The court of appeals affirmed. *Connelly v. United States*, 249 F.2d 576 (C.A. 8). This Court denied certiorari, 356 U.S. 921.

The trial commenced on May 7, 1956. On May 23, a co-defendant, Harry I. Schwimmer, a lawyer of Kansas City, Missouri, was stricken with a heart attack and a mistrial was thereafter declared as to him. The contemporaneous motions for mistrial of petitioners were denied. After the verdict, these motions were renewed and motions for judgment notwithstanding the verdict or, in the alternative, for a new trial were filed. Before these motions were heard, Judge Hulen, the trial judge, died, and Judge Gunnar H. Nordbye was named as successor judge, pursuant to Rule 25, F.R. Crim. P. Petitioners filed a supplemental motion for new trial, based on Judge Hulen's death and upon newly discovered evidence as to the alleged failure of some of the jurors to answer material questions upon *voir dire* examination. On March 4, 1957, petitioners filed an additional motion for a new trial, based on newly discovered evidence. All defense motions were overruled, following which sentence was pronounced.

2. After affirmance of the convictions and denial of review by this Court, petitioner Connelly, on June 12, 1958, and petitioner Caudle, on June 18, 1958, filed the present motions for new trial based on newly discovered evidence (the third motion based on newly

discovered evidence and the fourth new trial motion). Substantially identical allegations were made, to the effect that Schwimmer, after his heart attack during the trial, had suffered a cerebro-vascular accident, or stroke, on October 17, 1956; as a result, he had been deprived of the power of speech; but he had recently made a partial recovery (R. 6–9, 50–53). Both motions alleged that, if Schwimmer's testimony had been available at the trial, petitioners "should have won an acquittal and been exonerated by the Court and jury instead of convicted" (R. 7, 51). Attached to the motions were sworn statements by Schwimmer, recently obtained (App. 2–22). Petitioners sought his deposition by interrogatories and counter-interrogatories (R. 64–71).

Submitted with the motions was a statement of Dr. Irving S. Wright, Schwimmer's personal physician since September 27, 1954. Schwimmer reported a history of coronary thrombosis in March 1949, followed by a very serious similar attack in April of that year.[2] He had suffered a series of light strokes after the trial in May 1956, followed by a severe stroke on October 17, 1956, which caused a loss of speech and partial blindness. He had not improved appreciably until about three months before the date of the doctor's statement which was June 5, 1958. The doctor ex-

[2] In his testimony to the grand jury, which was submitted to the trial court, Schwimmer testified that his wife had been told by Dr. Karl Menninger "just as the other doctors explained to me later on when I noticed it myself, that this damage to my brain was a result of my heart attack, had probably caused me loss of memory up to a certain point" (G.J. Tr. 2323–2325).

pressed the opinion that emotional or physical stress would endanger the patient's life (R. 10–12).

At the request of the government, Schwimmer was examined on July 5, 1958, by Dr. John E. Scarff, a neuro-surgeon of New York City, who reported in part (R. 99):

> When I asked the patient about his memory, he told me that it was "very bad." I specifically asked him what he could remember about his life before his last cerebrovascular accident ("stroke"). He told me in his slow, hesitant and aphasic type of speech that he could remember "living in this house" and could remember his wife, and could remember that the colored maid had been with him before he had his stroke; but he added, "that is about all I can remember before my stroke." During this part of the examination the patient became quite emotional and cried on several occasions.

Dr. Scarff's conclusion was (R. 100–101):

> In regard to the patient's mental competence to testify on legal matters pertaining to events which took place prior to his cerebro-vascular accident of October 17, 1956, I am of the firm opinion that he is incompetent. The patient stated to me in very positive language that he could remember almost nothing about his life prior to his stroke.

The court granted the motion to take Schwimmer's deposition by interrogatories and cross-interrogatories. The deposition was taken on September 29 and 30, 1958, in the presence of attorneys for all the parties, Schwimmer's physician, and his daughter.

3. A matter principally stressed was Schwimmer's explanation of a government exhibit, 100–J, which had been admitted at the trial. This exhibit reads as follows:

OCT—49

Loan $2,500	
From I. Sachs	
Shu-Stiles	$10,000
Pd out Oil Royalty M. C	4,200
	$5,800

Held in Escrow to be paid out depending on whether I. Sachs case is dropped.

In the grand jury investigation, Schwimmer had testified that he had entered these items in his journal as fees (G.J. Tr. 2505–2515, 2549–2552, 2596–2597). To his best recollection the $2,500 was for work already done and the $10,000 was for services to be rendered (G.J. Tr. 2514–2515). Only a small amount was apportioned for the year 1949 for tax purposes and the rest was reported in subsequent years when the work was done, although his returns were prepared on a cash basis (G.J. Tr. 2549–2552). The $10,000 was a retainer and not a deposit by Sachs (G.J. Tr. 2513–2514). Schwimmer also testified that he never had an arrangement with Sachs for the return of any part of the $10,000 if his case was prosecuted, nor did he have any memory that he had ever agreed with anyone that any part of the $10,000 was to be held in escrow for any purpose, nor did he have any independent recollection that his fees were

to be contingent upon the outcome of the case (G.J. Tr. 2615–2617).[3]

The place of Exhibit 100–J in the context of the trial is set forth in the opinion affirming petitioners' conviction (249 F. 2d 576). The Irving Sachs tax evasion case had been referred to the Department of Justice on August 12, 1949, after it had been pending in the Bureau of Internal Revenue for about four years, where delays had been procured by Schwimmer with the assistance of petitioner Connelly. The court says, at page 586:

> In September of 1949 Connelly then called Caudle and requested further postponement for his "friend" Harry I. Schwimmer. In response to this request Caudle relayed a message through Connelly to Schwimmer that Schwimmer could come in whenever he wanted but as soon as possible and that a postponement would be all right because the statute of limitations was not involved. A few days subsequent to this contact between Connelly and Caudle, Sachs paid $2,500 from Shu-Stiles, Inc. money to Schwimmer and on October 12, 1949, gave Schwimmer a check for $10,000, from which Schwimmer purchased an oil royalty for Connelly. * * *

The court of appeals quotes and adopts the finding of Judge Nordbye on the admissibility of the journal entry made by Schwimmer (249 F. 2d at p. 587):

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[3] The foregoing testimony was the basis for the indictment for perjury returned against Schwimmer on November 18, 1955, which is referred to in the opinions of the district court and the court of appeals.

Government's Exhibit 100–J does not represent the entry of a mere narrative event, but it consists of an act of a conspirator who was handling the fund by and through which the conspiracy was to be accomplished. The entry consists of a recording of the receipt of the first anticipated disbursement thereof and the earmarking of the remaining funds for the purpose of carrying out the conspiracy. To earmark or allocate the remainder of a slush fund which has been created for the purpose of consummating an unlawful conspiracy would be an act in furtherance of such conspiracy.

We are in accord with Judge Nordbye's views. There was independent evidence that on October 12, 1949, co-conspirator Sachs, president of Shu-Stiles, Inc., gave Schwimmer a $10,000 check in addition to a prior payment of $2,500 on September 22, 1949, both of which are reflected in this exhibit. This testimony shows that these entries were made during the existence of the conspiracy. We think the exhibit was properly admitted as against both appellants.

4. Schwimmer's answers to the defense interrogatories on this motion for a new trial may be summarized as follows: The exhibit [No. 100–J] is in his handwriting. He kept the record for the purpose of income tax procedure. He had not purchased any oil royalty in October 1949 for $4,200. That entry was made afterward, but he could not say when. The item of $5,800 to be held in escrow was to be paid to him if the Sachs case was dropped; however, the amount came to $6,400. He did not know whether he reported any part of this on his federal income tax return

(App. 28–30). He purchased an oil royalty for petitioner Connelly, paying for it $3,600, but selling it to the latter for $700 without disclosing to him its actual cost. Later, Schwimmer's daughter bought it from petitioner Connelly for $1,800 (App. 30–31). Schwimmer also bought an oil royalty for petitioner Caudle. Caudle became angry with him and told him he should not have done it and to get it out of his name. Caudle did not receive any of the dividend checks from the royalty; nor did he receive any part of the $10,000 or the $5,800 shown in Exhibit 100–J (App. 32–35).

On the government's cross-interrogatories, Schwimmer stated that the Sachs case was the first tax case he had ever handled (App. 38). He agreed with his co-counsel in the case that he would bill the client when the work was finally concluded (App. 39). He received a retainer of $1,350 from the client on January 2, 1948 (App. 40). He presumed that he told the grand jury that, of the $10,000 check he received from Shu-Stiles, $5,800 was going to him and $4,200 was going to Matt Connelly, but he did not know whether he told them that in the first place (App. 50). He told the grand jury that the $10,000 check was a retainer. He told them a certain amount was going to him and a certain amount to Matt Connelly, but the latter never knew about it (App. 51). His co-counsel were not supposed to know about this (App. 52). He did not know whether he explained to the grand jury that part of the $10,000 was intended or actually used to buy an oil royalty for Connelly (App. 53).

When shown Exhibit 100–J, Schwimmer stated, "I cannot read the exhibit at all." But he remembered making the entry, "because I got the figures down here" (App. 54). He was asked (App. 55):

> 98th Interrogatory: In respect to the line "Pd out Oil Royalty M. C. 4,200", it has been conceded that "M. C." refers to Matthew Connelly, and that $3,600 for an oil royalty was taken from this account. Why did you indicate the sum of $4,200 here as the sum used for oil royalty?
>
> Answer: I don't know why I did that.

Schwimmer stated that the "escrow" referred to in the $5,800 item "to be paid out depending on whether I. Sachs is dropped" meant that the money was to go to him. He did not know why it would be "paid out" if it was already in his account (App. 56). It was his idea that the royalty checks payable to Connelly be sent to his own office in Kansas City and then forwarded to Connelly. The purpose was not to make it difficult to trace the transactions (App. 61).

Schwimmer presumed that he and possibly his secretary had indorsed petitioner Caudle's name to some of his checks. He admitted that the first three of Caudle's oil royalty checks were indorsed first by Caudle and then by him, following which he bought a cashier's check in the total amount of all three, that he kept the cashier's check a year; and then negotiated it in Puerto Rico. He had a reason to do this, but he did not know what it was (App. 62–63).

He was asked whether he wrote a letter on July 13, 1950, to Chris Rhodes, stating that he [Schwimmer] was willing to pay $3,300 for an oil royalty but he

had to get this information to the person interested, which should take a couple of days; however, he was pretty confident that the latter would take it. He answered that he did not admit writing the letter, but he "was pretty close to that." He did not know who the other person referred to was. He did not remember whether he wrote Rhodes two days later, saying that he had just received word to go ahead on the purchase and that it should be in the name of T. L. Caudle, 2939 Newark, N.W., Washington, D.C. (App. 65–66).

Interrogated as to a check from Shu-Stiles to himself in the amount of $3,600, dated July 15, 1950, Schwimmer stated he presumed that he deposited it in the bank. The entry in his journal, Plaintiff's Exhibit 100–P, of $3,600 as "Reimbursement of Money Advanced Shu-Stiles" had nothing at all to do with Caudle's oil royalty. Schwimmer did not know what it meant (App. 65–67).

Schwimmer was further asked as to a letter admitted in evidence, dated September 18, 1950, from himself to Chris Rhodes, asking the latter to check with the Sinclair Oil Company relative to the September 15 royalty check, and stating, "Mr. Caudle has already asked me about it." Schwimmer said he did something like that, but Caudle had nothing to do with it (App. 67). He was then asked (App. 67–68):

> 180th Interrogatory: If you wrote the letter, did you tell Rhodes the truth when you said that Caudle had already asked about the September 15th oil royalty check?
>
> Answer: No, it—

> Well, what shall I answer, yes or no? I said Caudle had nothing to do with that royalty.

Schwimmer did not remember, but supposed that he wrote a letter on October 12, 1950, telling Rhodes he still had not received the September 15th check, and stating, "I hate like the devil to bother you, but I am sort of in a spot" (App. 68).

He stated that he never told Mr. Sheffrey, co-counsel in the Sachs case, that he wanted to give some oil royalties to Caudle because of his attitude in the case; Sheffrey lied about that (App. 69). He further said that, in arranging for the papers and royalty checks in both the Caudle and Connelly oil transactions to come to his own office, he did not intend to conceal the transactions, but he did not know why he did it that way (App. 69).

5. Petitioners submitted with the answers to the interrogatories several affidavits relating to Schwimmer's competency. The principal affidavit was that of Dr. Nathan S. Kline, who made a psychiatric examination of Schwimmer on December 7, 1958. He stated that during forty-five minutes of intense questioning the patient remained completely clear and well oriented and his memory for past events was excellent (R. 217–218). The following conclusion was stated (R. 218):

> It is my considered judgment that Mr. Schwimmer, when questioned under suitable circumstances, is fully capable of understanding questions asked of him and that his memory and recall are adequate to reply to such questions completely.

6. The district court denied the motions for new trial on March 4, 1959, giving its reasons in a written opinion (App. 76–91). The court of appeals affirmed. 271 F. 2d 333; App. 92–98.

ARGUMENT

1. The rule of this Court as to review of the grant or denial of a defense motion for a new trial based on newly discovered evidence has been explicitly stated in *United States* v. *Johnson*, 327 U.S. 106. There, the Seventh Circuit had reversed a trial court's judgment denying such a motion. The Court granted certiorari for the reason that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances". 327 U.S. at 111. The Court not only reversed the court of appeals and reinstated the judgment of the trial court, but it also held that the defendant's appeal "was so devoid of merit that it should have been dismissed" (327 U.S. at 111). The reason for this ruling was stated at pages 111–112:

> But it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. *Holmgren* v. *United States*, 217 U.S. 509; *Holt* v. *United States*, 218 U.S. 245; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481. While the ap-

> pellate court might intervene when the findings of fact are wholly unsupported by evidence, *cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247; *Glasser* v. *United States*, 315 U.S. 60, 87, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

In this case, Judge Nordbye carefully reviewed the testimony of Schwimmer which petitioners proffered on this motion for a new trial, and concluded in the end that a jury would not give "any weight" to this additional evidence (App. 91). The judge viewed the answers in the deposition as frequently "incoherent and vague" (App. 81); held that certain crucial testimony "is so patently contradicted by his other answers to the interrogatories that no credence can be placed thereon" (App. 82); ruled that the deposition testimony "has not weakened the basis for the admissibility" of Exhibit 100-J (*supra*, p. 6) "as relevant and competent evidence as to each of" the petitioners (App. 83; see also App. 86); held that certain other testimony on which petitioners rely "merely assumes to corroborate testimony which was given at the trial" and "[a]t best, the alleged corroboration is of questionable probative value" (App. 85), and that the "greater portion" of the testimony "of co-conspirator Schwimmer" "is merely corroborative or impeaching" (App. 89); and, finally, characterized Schwimmer as "the arch conspirator in the scheme and plan condemned by the jury", "an admitted perjurer" whose "motives from the beginning were venal and corrupt", a "discredited witness" (App. 90). It was

on this basis that Judge Nordbye denied the motion. As shown in the Statement, *supra*, pp. 6–12, and in the discussion, *infra*, pp. 20–23, there was ample support for his findings and conclusion. Accordingly, the rule of the *Johnson* case squarely applies.

Petitioners challenge the conclusiveness of Judge Nordbye's findings on the ground that he was not the trial judge, pointing to the reference in *Johnson*, 327 U.S. at page 112, to the trial judge's knowledge of the unfolding of the case from day to day. It is true that the death of Judge Hulen and the substitution of Judge Nordbye, under Rule 25, F.R. Crim. P., prevented the determination of the post-trial motions from being made by the judge who presided at the trial. However, contentions based upon this fact were extensively litigated on the first appeal, and held not to necessitate a new trial. *Connelly v. United States*, 249 F. 2d 576, certiorari denied, 356 U.S. 921, rehearing denied, 356 U.S. 964. Petitioners are attempting to revive the same arguments in the present proceeding. It is undoubtedly preferable to have post-trial motions ruled upon by the judge who heard the evidence originally, but the turn of events may make such a review impossible. Here, the substitution of judges was of diminished importance because of the nature of the prosecution's evidence. It was virtually all documentary and there was no question of the credibility of the witnesses identifying it. Judge Nordbye's painstaking study of the record of the six-weeks trial was commented upon by the court of appeals on the original appeal, 249 F. 2d at pages 579–580, and is evidenced in the present proceeding by

the fullness of the hearings and by the care and accuracy of his opinion (App. 76–91). While the nature of such documentary evidence theoretically makes possible a fuller review by an appellate court, it is obvious that Judge Nordbye has, and must necessarily have, a far greater grasp of this case than an appellate tribunal could have.

2. The main attack is upon the standard petitioners say that Judge Nordbye applied in ruling on the motion, *i.e.*, "whether or not it is probable that, if a new trial were granted, these defendants, with the addition of this newly discovered evidence to the present record, would be acquitted" (App. 81). But there is no occasion in this case for the Court to determine whether that criterion is appropriate for all motions for a new trial on the basis of new evidence. In the first place, each petitioner alleged in his motion that, if Schwimmer's testimony had been available at the trial, "he should have won an acquittal and been exonerated by the Court and jury instead of convicted" (R. 7, 51), thereby framing the issue in the terms which they now criticize the district court for restating in their own terms. Second, although Judge Nordbye did frame the test in terms of probable acquittal on a new trial, his ultimate conclusion went beyond that standard: "It seems *inconceivable* that the additional evidence of the one who spawned the plan and scheme to corrupt government officials could have *any weight* in producing a verdict other than that which was returned by the jury" (App. 91; emphasis added). That final conclusion, as well as the subsidiary findings throughout the opinion and its entire

tone, meet the loosest standard for which petitioners now contend. Thirdly, the possible difference in criteria applied by different courts—to which this Court has adverted in *Johnson*, 327 U.S. at p. 111, fn. 5, and in *Mesarosh* v. *United States*, 352 U.S. 1, 9, fn. 4; 12, fn. 6—mainly has significance where it is claimed that an important Government witness perjured himself at the trial. But where, as here, the newly discovered evidence does not go to a claim of perjury or recantation, and particularly where it is cumulative or impeaching and the case is non-capital, there has been far less contrariety of expression. See footnote 5, *infra*, p. 18.

Nor are petitioners correct in assuming that *Griffin* v. *United States*, 336 U.S. 704, 708–709, has formulated a lesser standard which calls for reversal in this case. There, the Court stated, in remanding to the District of Columbia Court of Appeals a first degree murder case for determination of the rule to be locally applied as to admissibility of uncommunicated threats in support of a plea of self-defense:

> Were the Court of Appeals to declare that the controverted evidence was admissible according to the law prevailing in the District, it would have to consider further whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it. * * *

There is no indication from this language that the Court intended to state a formula applying to all motions for a new trial. The Court was dealing with

an offense involving a mandatory death penalty, where the government had expressly conceded that a greater liberality should be extended because a human life was in the balance, and that a new trial should be granted if a reasonable possibility existed that the new evidence would result in the return of a different verdict.[4] It is quite evident that the Court was disposing of the capital case before it, but was not attempting to lay down an unbending rule that should govern all cases of all types. If it had intended to establish a general rule for all cases, the court would undoubtedly have discussed the various lower federal court and state cases, especially since the very great weight of authority in cases such as this supports the standard which petitioners themselves invoked in their motions (see p. 16, *supra*).[5]

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[4] Noting this concession, the dissent (which would have had this Court itself determine that the evidence was admissible) stated at page 724: "If the evidence is admissible, a motion for a new trial should be granted. A contrary determination would be an abuse of discretion, for there is manifestly a reasonable possibility that the jury would lessen the verdict of first-degree murder."

[5] *Mesarosh* v. *United States*, 352 U.S. 1, 9, carefully distinguishes the situation there presented from motions for a new trial initiated by the defense under Rule 33, F.R. Crim. P.—citing *Johnson*, *supra*, 327 U.S. 106, as well as *United States* v. *Johnson*, 142 F. 2d 588, 592 (C.A. 8), certiorari dismissed, 323 U.S. 806, the case so extensively criticized by the petitioners here.

In cases where the newly discovered evidence consists of something other than alleged perjury, the lower court decisions hold that the court should not order a new trial unless it is convinced that consideration of the new evidence by the jury and a new trial would probably result in a different verdict. *Brandon* v. *United States*, 190 F. 2d 175, 178 (C.A. 9); *Thompson* v. *United States*, 188 F. 2d 52 (C.A.D.C.); *Heald* v. *United States*, 175 F. 2d 878, 883 (C.A. 10), certiorari denied, 338 U.S.

In particular, petitioners plainly err in regarding the language used in *Griffin* as a test designed to be applicable to all cases, and automatically calling for a new trial whenever newly discovered evidence is presented as to which a jury *might* attach significance. This is merely another way of saying that, if the evidence is admissible and relevant, there must be a new trial, a standard rejected by *Johnson*, 327 U.S. at pages 110, 113. Such a test could easily call for repeated new trials and, especially in view of the liberal two-year period in which such a motion may be filed, could extend the final disposition of a case indefinitely. Speaking of the liberal time limit provided in Rule 33, the Court said in *Johnson*, at pages 112–113:

> It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences. Especially is this true where delay is extended by appeals lacking in merit. This case well illustrates this possibility. While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from re-

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859; *Weiss* v. *United States*, 122 F. 2d 675, 691 (C.A. 5), certiorari denied, 314 U.S. 687; *Johnson* v. *United States*, 32 F. 2d 127, 130 (C.A. 8); *United States* v. *Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y.), affirmed, 201 F. 2d 372 (C.A. 2), certiorari denied, 345 U.S. 942; *Murphy* v. *United States*, 198 F. 2d 87 (C.A.D.C.); *United States* v. *Rutkin*, 208 F. 2d 647 (C.A. 3); *Pitts* v. *United States*, 268 F. 2d 808 (C.A. 9); see *United States* v. *Johnson*, 327 U.S. 106, 110, fn. 4. This has also been the rule in the states. See the Brief for the United States in *Griffin* v. *United States*, No. 417, Oct. Term, 1948, p. 20, fn. 6.

viewing findings of fact which have evidence to support them. The circuit court of appeals was right in the first instance, when it declared that it did not sit to try *de novo* motions for a new trial. It was wrong in the second instance when it did review the facts *de novo* and order the judgment set aside.

3. For these reasons, we do not regard it as a part of the duties of this Court to review the facts in this case *de novo,* but, since the testimony of Schwimmer on his deposition has been depicted as being of such vital significance, we consider it in its context.

Viewed as a whole, Schwimmer's attempted explanations of Exhibit 100–J (*supra,* pp. 6 *ff*) do more to incriminate than to exculpate petitioners. We do not stop to point out the many conflicts in his testimony, both within the deposition itself and within his former testimony before the grand jury, or the difficulty in piecing out any connected account from his disjointed answers. One thing is quite clear from his testimony as to this exhibit—that he did purchase a valuable oil royalty for petitioner Connelly from the $10,000 advanced by his client. His conflicting explanations as to what was intended to be done with the remainder of the fund do not detract from the impropriety of that purchase.[6] Although it is claimed that the purpose of entering this transaction on the books was for "income tax procedure," Schwimmer was unable to state what taxes were paid on the transaction.

[6] Although the *Sachs* case was not dropped, but proceeded to a conviction, there is no evidence that the remainder of the $10,000 was ever returned to the client.

His testimony as it related to the transaction involving petitioner Caudle is likewise inculpatory. He states that it was his idea for the papers and checks for both petitioners to be sent to his Kansas City office, although he could not explain why this arrangement was made. He "presumes" that he and possibly his secretary indorsed Caudle's name to some of the checks and admits the involved transaction whereby three of the Caudle royalty checks were used by Schwimmer to buy a cashier's check of equal amount which he held for a year and then negotiated in Puerto Rico—the explanation for which he cannot now give. His answers to the questions relating to the correspondence with Chris Rhodes concerning the Caudle oil royalty purchase, and the ensuing complaints as to delay in receiving the royalty checks, would inevitably be hurtful to the defense.

A large proportion of Schwimmer's answers were that he did not know or did not remember. It would seem apparent from all the evidence as to his mental condition, including his own admissions on that subject to the grand jury long before he suffered any of these paralytic strokes, *supra*, p. 4, fn. 2, that Schwimmer's memory was gravely defective. It would be highly inappropriate to order a new trial to hear the disconnected, conflicting, and hazy answers given by a witness deeply involved, as is agreed by all parties, in grave improprieties and whose mental condition has come to match his physical frailty. The record amply supports the "strong conviction" expressed by Judge Nordbye (App. 91) that the testimony of this witness "is merely a vehicle utilized by the defend-

ants to obtain another trial, rather than to use his testimony in their behalf with the expectation that, in light of the present record, it would have sufficient weight with a jury to bring about an acquittal."

4. Finally, if the court should reach that issue, there was no abuse of discretion by the trial court in its appraisal of Schwimmer's credibility. This appraisal was that the witness was an admitted perjurer who had spawned a plan to corrupt government officials and that reliance upon his testimony would have the effect of poisoning the minds of a jury against petitioners (App. 90–91).

The unreliability of the witness is obvious by a comparison of his testimony before the grand jury (*supra*, pp. 6–7) and his different testimony on this deposition (*supra*, pp. 8 *ff*). The court's characterization of the witness is not far different from that expressed by petitioners at various stages of this litigation.[7] As a judge charged with the duty of

[7] At page 85 of appellants' original brief in the court of appeals, they say: "Schwimmer's presence poisoned the atmosphere of the trial against all defendants and the ensuing prejudice was aggravated when a mistrial was declared as to him." Page 86 of the same brief: "The specter of guilt hovered in the mind of the jury. But the defendant who had spawned the specter was no longer a defendant." The Connelly petition for a writ of certiorari (No. 739, October Term, 1957), following the adverse decision of the court of appeals, said, p. 33: "But Schwimmer was gone and petitioner, with Caudle, was left to bear the brunt of a jury aroused by the devastating evidence deeply inculpating Schwimmer." Page 34 of this petition: "But Judge Nordbye had not been in the courtroom during the trial and could, therefore, only guess as to the effect which Schwimmer, and the specter of guilt he had spawned, had had on the jury."

In the court of appeals on this motion for a new trial,

evaluating the weight of the proffered evidence in order to determine whether his discretion should be exercised in favor of awarding a new trial (see *supra*, pp. 13–16), Judge Nordbye necessarily had to consider the record as to this witness, which amply supported the view he took.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

KIRBY W. PATTERSON,
Attorney.

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petitioner Caudle's brief, page 21, said: "This defendant would be the last to vouch for the past reputation of Schwimmer, since it is because of Schwimmer that defendant finds himself in his present predicament. * * * In spite of his shady past, there are certain facts which have occurred since Schwimmer committed those unethical acts." Petitioner Connelly's brief in that court, page 29, states that Schwimmer's deposition "may have substantiated, rather than disproved the charge of perjury * * *."

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